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## THE ROLE OF MILITARY TRIBUNALS UNDER THE LAW OF WAR

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### I. SUPREME COURT PRECEDENTS

In its swiftly rendered decision in *Ex parte Quirin*,<sup>1</sup> the Supreme Court upheld in 1942 the authority of a military commission sitting in Washington, D.C. to try seven German saboteurs who had entered the United States secretly to perform their mission of destruction. The Court reasoned that the Articles of War then in effect made clear that, in conferring jurisdiction on general courts-martial to try violations of the law of war, Congress had not intended to limit the long recognized jurisdiction of military commissions.<sup>2</sup> The Court’s opinion noted that American citizenship was no bar to trial by military commission of “offenders against the law of war,” and it mentioned that the President, as Commander-in-Chief, has “the power to wage war which Congress has declared.”<sup>3</sup>

A few years later—shortly after hostilities had ended in the Far East—Japanese General Yamashita was tried and sentenced to death by a military commission in the Philippines.<sup>4</sup> An ensuing effort to contest the commission’s jurisdiction failed in the Supreme Court.<sup>5</sup> Instead, the Court reaffirmed the principle established by *Quirin* that the Constitution, in Article I, § 8, cl. 10, provides authority for use of military commis-

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<sup>1</sup> *Ex parte Quirin*, 317 U.S. 1 (1942) (argued July 29-30, 1942, decided July 31, 1942).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 26, 44-46.

<sup>4</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>5</sup> *Id.*

sions to punish violations of the law of war as "Offences against the Law of Nations."<sup>6</sup>

The Supreme Court soon reaffirmed in two other cases the authority of military tribunals established under the law of war. The first was *Johnson v. Eisentrager*, which concerned a German defendant who, after Germany surrendered but before the end of hostilities between the United States and Japan, had engaged in conduct in China for which he was tried there by an American military commission.<sup>7</sup> After being convicted and transferred to an American confinement facility in Europe, he sought to contest by habeas corpus the jurisdiction of the commission.<sup>8</sup> Over dissent, the Court ruled that the defendant had no right to petition for habeas corpus.<sup>9</sup>

Two years later, in *Madsen v. Kinsella*,<sup>10</sup> the Supreme Court upheld the jurisdiction of an occupation court established incident to American military governance of a portion of post-World War II Germany.<sup>11</sup> The occupation court convicted Mrs. Madsen, an American citizen, of murdering her husband, who was an American service member stationed in Germany. In upholding the jurisdiction of the occupation court, the Supreme Court relied on prior law upholding military commissions and observed:

By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses, which in war would go unpunished in the absence of a provisional forum for the trial of offenders.<sup>12</sup>

All the parties agreed that, under the particular circumstances, Mrs. Madsen could have been tried by an American general court-martial convened under the Articles of War, but she contended that the availability of this alternative precluded trial by the occupation court.<sup>13</sup> The Court, however, under its construction of the Articles of War, concluded that the

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 781.

<sup>10</sup> *Madsen v. Kinsella*, 343 U.S. 341 (1952).

<sup>11</sup> The occupation court, which consisted of three civilians, was the United States Court of the Allied High Commission for Germany, Fourth Judicial District. *See id.* at 344. The history of the American military government courts in Germany is set forth in an appendix to the Court's opinion. *See id.* at 360.

<sup>12</sup> *Id.* at 346 n.8.

<sup>13</sup> *Id.* at 345-346. This assumption as to the jurisdiction of a general court-martial was undermined several years later by the Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957).

option of trial by general court-martial did not preclude referring the case to an occupation court.<sup>14</sup>

## II. UNIFORM CODE OF MILITARY JUSTICE

Undoubtedly those who drafted the Uniform Code of Military Justice for enactment in 1950<sup>15</sup> were well aware of Article I, § 8, cl. 10 of the Constitution, which empowers Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>16</sup> This constitutional provision supported the precedents upholding the establishment of military commissions<sup>17</sup> and the reference in Article of War 12 to “any person who by the law of war is subject to trial by a military tribunal.”<sup>18</sup>

Accordingly, Congress provided in Article 18 of the Uniform Code that, in addition to persons made subject to the Code by Article 2, general courts-martial would have “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”<sup>19</sup>

Article 2 of the Code sought to extend military jurisdiction to include, “[i]n time of war, all persons serving with or accompanying an armed force in the field,” as well as “all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States” and certain related “territories.”<sup>20</sup> In a companion effort to eliminate gaps in the jurisdiction of courts-martial, Article 3 of the Code provided for trial by court-martial of certain persons who by reason of their “status” were subject to trial by court-martial but for whom that “status” had terminated and therefore could not be tried in any federal or state court for the prior conduct that had violated the Uniform Code.<sup>21</sup>

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<sup>14</sup> *Id.* at 361.

<sup>15</sup> Act of May 5, 1950, Pub. L. No. 506, ch. 169, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801-946 (2000)).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>17</sup> See, e.g., *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1; *Ex parte Foley*, 243 F. 470 (1917).

<sup>18</sup> Articles of War 12 (1920). This constitutional provision also provides the basis for centuries-old legislation authorizing punishment of anyone who “on the high seas commits the crime of piracy as defined by the Law of Nations . . .” 18 U.S.C. § 1651 (2000).

<sup>19</sup> Act of May 5, 1950, ch. 169, 64 Stat. 114 (codified as amended at 10 U.S.C. § 818 (2000)).

<sup>20</sup> Act of May 5, 1950, ch. 169, 64 Stat. 109 (codified as amended at 10 U.S.C. § 802 (2000)). Some of the “territories,” such as Hawaii and Alaska, are now part of the United States. The provisions of Article 2(11) were subject to “the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law.” *Id.*

<sup>21</sup> Act of May 5, 1950, ch. 169, 64 Stat. 109-110 (codified as amended at 10 U.S.C. § 803 (2000)).

However, some of these codified attempts to extend courts-martial jurisdiction were later rejected by the Supreme Court.<sup>22</sup>

In order to avoid any misinterpretation of the legislative intent in granting to general courts-martial jurisdiction to try violations of the law of war, the Uniform Code states in Article 21 that the provisions of the Code "do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."<sup>23</sup> Article 28 authorizes appointment of reporters and interpreters for a "court-martial, military commission, or court of inquiry"<sup>24</sup>; Article 36 authorizes the President to prescribe rules of procedure and rules of evidence for cases before "courts-martial, military commissions and other military tribunals"<sup>25</sup>; Article 47 provides for punishment of any person who "has been duly subpoenaed to appear as a witness before a courts-martial, military commission, court of inquiry, or any other military court or board"<sup>26</sup>; Article 48 provides that "a court-martial, provost court, or military commission" may impose for contempt a punishment not exceeding thirty days confinement, a fine of one hundred dollars, or both<sup>27</sup>; and Article 49 provides for reading of depositions "before any military court or commission in any case not capital."<sup>28</sup>

Article 104, which prohibits "any person" from aiding the enemy, authorizes "death or such other punishment as a court-martial or military commission may direct."<sup>29</sup> Finally, Article 106 provides, "[a]ny person who in time of war is found lurking as a spy or acting as a spy" under certain circumstances "shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."<sup>30</sup>

Since Article 21 of the Code refers to offenses that by statute or by the law of war may be tried by "military commissions, provost courts or other military tribunals,"<sup>31</sup> it appears that Congress assumed on the basis of

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<sup>22</sup> *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955). See also *Robinson O. Everett, Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366 (1960). Four decades later Congress tried to fill in part the jurisdictional gap by enacting the Military Extraterritorial Jurisdiction Act of 2000. See 18 U.S.C. §§ 3261-67 (2000).

<sup>23</sup> 10 U.S.C. § 821 (2000). The language of this Article mirrors that of Article of War 15. Article of War 15 (1920).

<sup>24</sup> 10 U.S.C. § 828 (2000).

<sup>25</sup> *Id.* § 836.

<sup>26</sup> *Id.* § 847.

<sup>27</sup> *Id.* § 848.

<sup>28</sup> *Id.* § 849.

<sup>29</sup> *Id.* § 904.

<sup>30</sup> *Id.* § 906.

<sup>31</sup> *Id.* § 821.

*Quirin* and *Yamashita* that a military commission may be properly appointed pursuant to “the law of war,” even in the absence of a statute. In any event, the Articles of the Uniform Code already analyzed—especially Articles 18 and 21—can be viewed as an implicit grant by Congress to the President and subordinate commanders of authority to appoint military commissions to try alleged violations of the law of war. However, issues remain as to what restrictions, if any, Congress intended to impose on the President’s exercise of his authority.

### III. LATER LEGISLATION

Congress has again referred to military commissions in legislation passed subsequent to enactment of the Uniform Code. In recent legislation concerning release and detention authority, Congress defined the term “offense” to mean “any criminal offense, other than an offense triable by court-martial, military commission, provost court or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by an Act of Congress.”<sup>32</sup> Additionally, 18 U.S.C. § 3172 (2000), which is part of speedy trial legislation, provides that “offense” does not include an offense “triable by court-martial, military commission, provost court, or other military tribunal.”<sup>33</sup>

When Congress enacted the Military Extraterritorial Jurisdiction Act of 2000,<sup>34</sup> authorizing trial in federal district courts for criminal offenses “committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States,”<sup>35</sup> Congress specifically noted:

Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.<sup>36</sup>

Once again, Congress seems to be implicitly recognizing presidential authority to appoint military commissions to try alleged violations of the law of war. Similarly, enactment of the Detainee Treatment Act of 2005 might be construed as an indirect recognition of the President’s authority to appoint military commissions under some circumstances.<sup>37</sup>

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<sup>32</sup> 18 U.S.C. § 3156(a)(2) (2000).

<sup>33</sup> 18 U.S.C. § 3172 (2000).

<sup>34</sup> 18 U.S.C. §§ 3261-67 (2000). In 2004, this Act was amended to extend the jurisdiction of the District Courts to include some additional classes of civilians acting in support of a Department of Defense mission. See 18 U.S.C.A. § 3267(2)(a) (2004).

<sup>35</sup> *Id.* § 3261.

<sup>36</sup> *Id.* § 3261(c).

<sup>37</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739-2744 (2005). This Act grants exclusive jurisdiction to the United States Court of Appeals for the District of Columbia Circuit “to determine the validity of any final decision

Mention should also be made of the War Crimes Act of 1996, which authorizes severe punishment for American nationals or service members who have perpetrated a "war crime."<sup>38</sup> This Act defines a "war crime" as conduct that violates one of several treaties to which the United States is a party.<sup>39</sup> Although this Act applies directly only to trials in federal courts, Article 134 of the Uniform Code, which prohibits "crimes and offenses not capital, of which persons subject to [the Uniform Code] may be guilty,"<sup>40</sup> would seem to have the effect of empowering general, special or summary courts-martial to try these "war crimes," if the perpetrator of the "war crime" is a person who falls within a category set out in Article 2 of the Code<sup>41</sup> and if the death penalty is not sought.<sup>42</sup>

#### IV. WHAT IS "WAR"?

If military commissions and general courts-martial have jurisdiction to try violations of the law of war, the question inevitably arises as to what constitutes war. The Constitution gives Congress authority to "declare War"<sup>43</sup> and makes no mention of "undeclared war," "armed conflict," or "hostilities." When the Constitution was being drafted, it probably was assumed that, if a serious military conflict developed, at least one of the parties would declare war. In any event, World War II—which gave rise to *Quirin* and *Yamashita* and shortly preceded the drafting of the Uniform Code—involved declarations of war on all sides, and the *Quirin* opinion refers to the power of the President as Commander-in-Chief "to wage war which Congress has declared."<sup>44</sup>

Congress enacted the Code only a few weeks before the start of the Korean War, a conflict in which there were no formal declarations of war. Since that time the United States, despite engagement in several very serious conflicts, has not declared war, had war declared against it, or participated significantly in a declared war. Accordingly, a potential issue exists as to the jurisdiction of military commissions, and, in some

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rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." *Id.* § 1005(e).

<sup>38</sup> 18 U.S.C. § 2441 (2000). Punishment of life imprisonment is authorized and, "if death results to the victim," a death penalty may be imposed. *Id.* § 2441(a).

<sup>39</sup> *Id.* § 2441(c).

<sup>40</sup> 10 U.S.C. § 934 (2000).

<sup>41</sup> *Id.* § 802.

<sup>42</sup> Since the War Crimes Act authorizes a death penalty if death results to a victim, it might be argued that a war crime should not be viewed as "not capital" for purposes of applying Article 134 of the Code and therefore is not incorporated by reference under Article 134. It is probably more likely that the War Crimes Act would be viewed as subject to incorporation under Article 134 if it were not alleged that a victim had died as a result of the war crime.

<sup>43</sup> U.S. CONST. art. 1, § 8, cl. 11.

<sup>44</sup> *Ex parte Quirin*, 317 U.S. at 26.

instances, even as to the jurisdiction of general courts-martial, when armed conflict exists but war has not been declared.

The United States Court of Military Appeals<sup>45</sup> in *U.S. v. Averette* faced a parallel issue in interpreting Article 2(10) of the Uniform Code, which makes subject to court-martial jurisdiction in “time of war, all persons serving with or accompanying an armed force in the field.”<sup>46</sup> The accused, a civilian employee of an Army contractor in the Republic of Vietnam, was convicted by an Army general court-martial of conspiring and attempting to steal government property. Although conceding that previously, in construing the tolling provisions of the statute of limitations,<sup>47</sup> the Vietnam conflict had been treated by the Court as a “war,” the majority opinion concluded that for the purpose of determining jurisdiction under Article 2(10) of the Code the words “in time of war” meant “a war formally declared by Congress.”<sup>48</sup> The majority stated:

We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison – the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation – the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.<sup>49</sup>

Although the Court of Military Appeals was dealing with the jurisdiction of a general court-martial, this precedent would seem very relevant in determining what constitutes “war” for the purpose of deciding whether the “law of war” provides a basis for military commissions to exercise jurisdiction. If, under Article 2 of the Uniform Code, a “declared war” is necessary for a “time of war” to exist (which would then justify the trial of civilians by general court-martial), should not the existence of a “declared war” also be required for invoking the “law of war” to allow for the trial of civilians by military commissions which typically provide fewer procedural safeguards than are available in general courts-martial?

Confronted by these questions, Congress is free to take no action and wait until later to decide whether either a general court-martial or a military commission has jurisdiction under the law of war absent a declaration of war. In reflecting on that alternative, Congress should consider, on the one hand, the declining use of declarations of war and the proliferation of undeclared wars and other armed conflicts and, on the other

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<sup>45</sup> The United States Court of Military Appeals is now the United States Court of Appeals for the Armed Forces. See 10 U.S.C. § 941 (2000).

<sup>46</sup> *U.S. v. Averette*, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

<sup>47</sup> See 10 U.S.C. § 843 (2000).

<sup>48</sup> *Averette*, 19 C.M.A. at 365-366.

<sup>49</sup> *Id.*

hand, the importance of maintaining a Congressional role in determining whether and under what conditions general courts-martial and military commissions may be used. Alternatively, Congress could proactively prohibit the use of military commissions in the absence of a declared war. However, such a prohibition would pose a separation of powers issue as to whether the President has any inherent power to create military commissions over the objection of Congress.

Under the circumstances, the best option would probably be for Congress to use the authority granted to it by Article I § 8, cl. 10 and amend Articles 18 and 21 of the Uniform Code to include expressly violations of the law of war, “declared” or “undeclared,” and all other “armed conflicts.”<sup>50</sup> In view of the proliferation of terrorist activity, language might also be included that would embrace the “war on terrorism.” For example, reference might be made to “offences against the law of nations,” or to the treaties that are specified in the War Crimes Act.<sup>51</sup> The premise for broadening the current language in Articles 18 and 21 would be as follows: if general courts-martial and military commissions are valuable tools for punishing “offences against the law of nations” when war has been declared, then they can also be useful means for enforcing international law that, as it has evolved and undoubtedly will continue to evolve, prohibits certain types of conduct even in the absence of any formal declaration of war.

At the same time, Congress might consider whether to authorize special courts-martial—and perhaps even summary courts-martial—to try violations of the law of war, which under Article 18 of the Uniform Code are expressly made subject to trial by general court-martial.<sup>52</sup> When the Code was enacted in 1950, special courts-martial could not impose confinement in excess of six months, whereas now they can impose up to a year of confinement.<sup>53</sup> Moreover, although general courts-martial originally had a “law officer” while the members of a special court-martial had no such legal adviser, now both special and general courts-martial are presided over by “military judges.”<sup>54</sup> In view of this restructuring, special courts-martial would now appear to be a more suitable forum for trying violations of the law of war than would have been true in 1950; perhaps they should also be expressly included under Article 18.<sup>55</sup>

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<sup>50</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>51</sup> See War Crimes Act, 18 U.S.C. § 2441(c) (2000).

<sup>52</sup> 10 U.S.C. § 818 (2000). It is arguable that the grant of jurisdiction to general courts-martial does not constitute an explicit exclusion of special and summary courts-martial. However, the more likely interpretation would be that special and summary courts-martial are excluded.

<sup>53</sup> Compare Act of May 5, 1950, ch. 169, 64 Stat. 114 with 10 U.S.C. § 819 (2000).

<sup>54</sup> Compare Act of May 5, 1950, ch. 169, 64 Stat. 117 with 10 U.S.C. § 826 (2000).

<sup>55</sup> Article 2(9) makes “prisoners of war in custody of the armed forces” subject to the Uniform Code and Article 2(10) includes “in time of war, persons serving with or



Indeed, the potential usefulness of summary courts-martial in trying persons accused of minor offenses in occupied territory might also warrant their inclusion under Article 18.

## V. MILITARY COMMISSIONS

In view of the language of the Uniform Code and other statutes, it seems clear that Congress anticipated a future time when the President as Commander-in-Chief would appoint military commissions under some circumstances. The question remains as to what restrictions, if any, Congress wished to impose on the President in his use of military commissions. It is also worth asking whether Congress prescribed any criteria that should be employed by the President and his subordinates in choosing to use a military commission to try a violation of the law of war as opposed to appointing a general court-martial to do so. Also, what did Congress intend the President to prescribe as rules of procedure and rules of evidence for military commissions?

Article 36 of the Uniform Code furnishes some guidance on the latter issue. As originally enacted, Article 36 provided:

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code. (b) All rules and regulations made in pursuance of this article shall be uniform insofar as practicable and shall be reported to the Congress.<sup>56</sup>

Although this statutory language has been slightly modified,<sup>57</sup> the basic legislative intent seems unchanged.

The Supreme Court recently cited Article 36 in *Hamdan v. Rumsfeld* to support its conclusion that the military commissions established by President Bush for trial of the Guantanamo detainees were unconstitutional.<sup>58</sup> The Court noted that the rules of procedure and rules of evidence prescribed by the President for the trials of the detainees differed substan-

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accompanying an armed force in the field." 10 U.S.C. § 802 (2000). Article 99 concerns misbehavior by a service member "in the presence of the enemy." 10 U.S.C. § 899 (2000). Article 104 prohibits "aiding the enemy." 10 U.S.C. § 904 (2000). Article 106 deals with spying "in time of war." 10 U.S.C. 906 (2000). Congress should also reexamine the language in these provisions to decide whether the references to "war" and "enemy" should be broadened to expressly encompass conduct occurring in an undeclared war or other types of armed conflict including the war on terrorism.

<sup>56</sup> Uniform Code of Military Justice, ch. 169, 64 Stat. 108, 120 (1950) (codified as amended at 10 U.S.C. § 836 (2000)).

<sup>57</sup> See 10 U.S.C. § 836 (2000).

<sup>58</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791 (2006).

tially from the rules set out in the Manual for Courts-Martial and were far less protective of the accused.<sup>59</sup>

Presumably, if the President has complied with the intent of Congress expressed in Article 36(a) of the Code, the procedural and evidentiary rules prescribed by the most current Manual for Courts-Martial provide an accused as many of the safeguards that would be available in federal criminal trials as the President “considers practicable” to make available to service members in courts-martial.<sup>60</sup> In turn, if the intent of Article 36(b) is carried out by the President in drafting procedures for military commissions, some of the protections available in federal criminal trials and derivatively in courts-martial would also be mirrored in the rules for military commissions. The failure of President Bush to comply with Congressional intent led a majority of the Court in *Hamdan* to hold that the military commissions established to try Guantanamo detainees were unconstitutional.<sup>61</sup> At the same time, the Court adopted a limiting interpretation of *Quirin* and its successor precedents.<sup>62</sup>

In line with the Congressional intent expressed in Article 36, it is arguable that the President should, to the extent “practicable,” refer violations of the law of war to general courts-martial rather than military commissions. The general courts-martial are preferable because they operate pursuant to an extensive Manual for Courts-Martial, which contemplates the examples of federal district courts and reflects the insights acquired over many years in trials by court-martial.<sup>63</sup> On the occasions when this option is rejected, preferably for reasons articulated by the President and his subordinates, and military commissions are used, the most appropriate course of action would be to apply to those commissions the rules of procedure and evidence from the Manual for Courts-Martial to the greatest extent possible.

In light of the Congressional intent manifested in the Military Justice Act of 1968, which upgraded the “law officer” of the general court-martial to “military judge” and also provided that special courts-martial should have “military judge[s]” when previously they had no legal adviser whatsoever, it would appear that if the President chooses to use military commissions he should at least require that such commissions have legal

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<sup>59</sup> See *id.* at 2791-2792. Trial by court-martial is governed by the rules prescribed by the President in Manuals for Courts-Martial, which are promulgated by executive order and amended from time to time by further executive orders. The 2005 Manual for Courts-Martial is the most recent. See JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL (2005) available at <http://www.jag.navy.mil/documents/mcm2000.pdf> [hereinafter MANUAL FOR COURTS MARTIAL].

<sup>60</sup> See 10 U.S.C. §836 (2000); see also MANUAL FOR COURTS-MARTIAL, *supra* note 59.

<sup>61</sup> *Hamdan*, 126 S. Ct. at 2775-77.

<sup>62</sup> *Id.* at 2771-75.

<sup>63</sup> See generally MANUAL FOR COURTS-MARTIAL, *supra* note 59.

advisers with qualifications like those of “military judges.”<sup>64</sup> In its *Hamdan* decision, the Supreme Court also relied on Common Article 3 of the Geneva Conventions, which contains a requirement of trial by a “regularly constituted court.”<sup>65</sup> Application of this language leads to a similar result; namely, that courts-martial should be used for trial of violations of the law of war unless there is some showing of a practical need to depart from this model. Thus, even if Congress repealed Article 36 of the Uniform Code—a very unlikely event—our country’s international commitments apparently would restrict use of ad hoc military commissions without some strong justification.

## VI. APPELLATE REVIEW

Another ground for criticizing the use of military commissions in trying violations of the law of war is that military commissions are not subject to the extensive judicial review provided for general courts-martial. Indeed, the review of general courts-martial and of some special courts-martial goes beyond the usual judicial review of convictions in federal and state courts in several respects: it includes review of the facts, the law, and the appropriateness of sentence by an intermediate court, and review of legal issues by a five-judge appellate civilian court (the Court of Appeals for the Armed Forces) established under Article I of the Constitution.<sup>66</sup> In some cases the direct appellate review even extends to the Supreme Court.<sup>67</sup> The availability of such extensive judicial review enhances confidence in the results of trials by court-martial.

On the other hand, for military commissions, the traditional route to judicial review is by means of habeas corpus and its availability is very limited. Indeed, the Detainee Treatment Act of 2005 specifically excludes jurisdiction as to any writ of habeas corpus filed on behalf of aliens confined at Guantanamo Bay, Cuba, and partially replaces such jurisdiction with a grant of “exclusive jurisdiction” to the United States Court of Appeals for the District of Columbia Circuit.<sup>68</sup> Moreover, the only automatic appellate review granted an accused is with respect to a capital case or a case in which the accused has been sentenced to a term

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<sup>64</sup> Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968) (codified as amended at 10 U.S.C. § 801 (2000)).

<sup>65</sup> *Hamdan*, 126 S. Ct. at 2795-96; see also Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3318, 3320.

<sup>66</sup> See 10 U.S.C. §§ 864, 866, 867, 869 (2000). A conviction by special court-martial receives this extensive review if the sentence includes a bad conduct discharge.

<sup>67</sup> 10 U.S.C. § 867a (2000).

<sup>68</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2739-44 (2005). The statute does not specify the scope and standard of review for review of Guantanamo Commission convictions by the Court of Appeals for the District of Columbia.

of imprisonment of ten years or more; in any other case review shall be at the discretion of the Court of Appeals for the District of Columbia.<sup>69</sup>

In one respect, the approach taken by Congress seems desirable because providing direct appeal is often simpler than requiring use of writs of habeas corpus. However, broadening direct appellate review and extending the scope of review beyond that which is provided in the Detainee Treatment Act would be preferable. This would enhance the confidence of defendants and the public in the results of any trials by military commissions. Additionally, a broad review and extended scope would better effectuate the Congressional objective, expressed in Article 36 of the Uniform Code, that the President apply the model of Article III courts so far as the President "considers practicable."<sup>70</sup>

Congress selected the United States Court of Appeals for the District of Columbia to perform direct judicial review of trials by military commission at Guantanamo. Another alternative would have been to establish an entirely new appellate court to review trials by military commissions at Guantanamo or elsewhere, but the cost of doing this would be disproportionate to the gain. The best alternative in the future might be for Congress to provide that the United States Court of Appeals for the Armed Forces review directly the proceedings of any military commission. The cases reviewed by this Court are probably more similar to those tried by military commissions than those of any other existing appellate court. Indeed, by virtue of Article 18 of the Uniform Code, the Court already has jurisdiction to review cases tried by general court-martial for offenses under the law of war.<sup>71</sup>

Since the Court of Appeals for the Armed Forces is an Article I Court, the President might ordinarily have the power to provide by executive order for this Court to perform appellate review of all convictions by military commission. However, since Congress has already made a different provision for review in connection with the Detainee Treatment Act, and thereby indicated an intent to have review of military commissions per-

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<sup>69</sup> *Id.* at 2743.

<sup>70</sup> 10 U.S.C. § 836 (2000).

<sup>71</sup> See 10 U.S.C. § 818. One of the first cases reviewed by the Court of Military Appeals was *United States v. Schultz*, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969), where a general court-martial in Japan had convicted a civilian of an offense committed in 1950—before the effective date of the Uniform Code. Prior to this offense, the accused had been accompanying the American armed forces, and under an Article of War similar to Article 2 of the Uniform Code he would have been subject to trial by court-martial for offenses committed during that period. However, at the time of the offense (for which he was later convicted), he no longer was accompanying the armed forces. Nonetheless, the conviction of Schultz for negligent homicide was upheld by the Court as being a violation of the law of war. The accused argued unsuccessfully that if jurisdiction only existed under the law of war then he should not have been tried by a general court-martial for a purported violation of the Uniform Code.

formed in a different appellate court, Congressional action would now seem to be required to invest the Court of Appeals for the Armed Forces with appellate jurisdiction over trials by military commission at Guantamo and probably by any other future military commissions.<sup>72</sup>

Convictions by general court-martial are reviewed as to the facts, law and sentence by intermediate service courts—the Courts of Criminal Appeals.<sup>73</sup> Subsequent review by the Court of Appeals for the Armed Forces is only as to issues of law and for the most part within that Court's discretion.<sup>74</sup> One alternative might be to use the Courts of Criminal Appeals for initial review of convictions by military commission and then to have discretionary review by the Court of Appeals for the Armed Forces as to issues of law. However, if no intermediate review were authorized, then the question would arise as to whether the Court of Appeals for the Armed Forces should perform a broader review than it does for trials by court-martial. For example, should the Court of Appeals for the Armed Forces review factual issues, and if so, by what standard? Likewise, what should be the standard of legal review for convictions by military commissions? Should review be discretionary or mandatory? Mandatory, at least in death cases or where the confinement imposed by military commission is above a stated threshold level?<sup>75</sup>

Article 67a makes decisions of the Court of Appeals for the Armed Forces subject to review by the Supreme Court by writ of certiorari if the Court of Appeals has granted an accused's petition for review.<sup>76</sup> However, it precludes the Supreme Court from reviewing a case in which a petition for review by the Court of Appeals for the Armed Forces has been denied.<sup>77</sup> Thus, only if, pursuant to Article 18 of the Uniform Code, a general court-martial convicts an accused for violations of the law of war and the case is then granted review by the Court of Appeals for the Armed Forces is a petition for certiorari to the Supreme Court permitted. Thus, it is also possible, under existing law, that general court-martial convictions of service members for violating the law of war may ultimately be reviewed by the Supreme Court. Likewise, if the Court of Appeals for the Armed Forces were authorized to exercise only discretionary review of convictions by military commissions, the Court of Appeals for the Armed Forces would be desirable to authorize a petition

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<sup>72</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2739, 2742-43.

<sup>73</sup> 10 U.S.C. § 866 (2000).

<sup>74</sup> See 10 U.S.C. § 867 (2000). Only in capital cases and appeals by the government is exercise of jurisdiction mandatory.

<sup>75</sup> Any threshold should probably be lower than the ten-year imprisonment requirement for mandatory review established by the Detainee Treatment Act in § 1005(e)(3)(B).

<sup>76</sup> 10 U.S.C. § 867a (2000)

<sup>77</sup> *Id.*

to the Supreme Court for certiorari in those cases as to which discretionary review had been granted.

Currently there are proposals to eliminate any restrictions on review by the Supreme Court of court-martial convictions denied review by the Court of Appeals for the Armed Forces. In the event of such an expansion of Supreme Court review, it might be appropriate to make a conforming change with respect to convictions by military commissions in order that those convictions also would be eligible for direct review by the Supreme Court despite denial of review by the Court of Appeals for the Armed Forces.

## VII. CONCLUSIONS

On various occasions in the past, military commissions have played an important role. *Hamdan* makes clear that by reason of the Constitution's separation of powers the President lacks absolute authority to define that role.<sup>78</sup> Instead, Congress must provide guidance for future use of military commissions and must specify the circumstances under which commissions, rather than courts-martial, may try violations of the law of war. Moreover, some minimum procedural requirements should be established by Congress for all future military commissions, and these procedures should be modeled insofar as "practicable" on the procedures of courts-martial and federal district courts.

Congress should consider modifying the language of the Uniform Code of Military Justice to provide expressly that courts-martial and military commissions have jurisdiction to try persons accused of violating international law during a time of "undeclared war" or other armed conflict or in connection with terrorist-related activities. Finally, provision should be made for the Court of Appeals for the Armed Forces not only to directly review convictions by general courts-martial pursuant to the law of war, but also to review convictions by any future military commissions.

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<sup>78</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006).